Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

COMMENTS OF THE FIBER BROADBAND ASSOCIATION ON THE NOTICE OF PROPOSED RULEMAKING, NOTICE OF INQUIRY, AND REQUEST FOR COMMENT

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The Fiber Broadband Association ("FBA" or "Association")[1] hereby submits these comments in response to the Federal Communications Commission's ("Commission's") Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment in the above-captioned proceeding on actions the Commission can take to "accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment."[2]

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1 The FBA was formerly known as the Fiber to the Home Council Americas (the "FTTH Council"). The Association's mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. The Association's members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. As of today, the FBA has more than 250 entities as members. A complete list of FBA members can be found on the organization's website: https://www.fiberbroadband.org/.

2 *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (rel. Apr. 21, 2017) (hereinafter referred to as the "NPRM," "NOI," or "RFC" depending on the section referenced).

INTRODUCTION AND SUMMARY

The FBA commends the Commission for seeking to propel wireline broadband infrastructure investment. Demand for higher-performance broadband services by consumers, businesses, and institutions is skyrocketing, and there is every indication this trend will continue. In response, broadband service providers are accelerating their deployment of all-fiber (including fiber-to-the-home ("FTTH")) networks across the country.[3] These providers and consumers recognize that all-fiber networks provide the performance and scalability necessary to meet bandwidth demands far into the future.

The growth in all-fiber deployments is good news; the bad news is that providers continue to encounter barriers erected by some entities that own or control critical infrastructure that thwart even faster deployment and that effectively waste capital. The Association herein discusses these barriers and proposes solutions in three key areas. First, the Commission should amend its pole attachment rules to address practices of many pole owners and existing attachers that delay and increase the cost of access. Second, the Commission should repeal the 2015 network change notification rule, which imposes an unnecessary and costly process, thereby hindering investment in fiber infrastructure. Third, the Commission should adopt criteria that can be used to readily determine which state and local laws and regulations violate Section 253 of the Communications Act and inhibit broadband deployment. These measures will "better

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[3] *See* Sean Buckley, "U.S. FTTH deployment rose 13 percent in 2015, says FTTH Council," FierceTelecom (Nov. 16, 2015) *available at* http://www.fiercetelecom.com/telecom/u-s-ftth-deployment-rose-13-percent-2015-says-ftth-council (citing FTTH Council/RVA, LLC research regarding the availability of FTTH services in the United States). In 2016, the growth rate for homes marketed with FTTH services rose even faster, at approximately 16 percent. *See* Michael Render, RVA LLC, "North American FTTH: The Latest Research" (presentation at 2016 Fiber Connect, Nov. 27, 2016).

enable broadband providers to build, maintain, and upgrade their networks, which will lead to more affordable and available Internet access and other broadband services for consumers and businesses alike."[4]

I. THE COMMISSION SHOULD AMEND ITS POLE ATTACHMENT RULES TO BETTER BALANCE THE INTERESTS OF POLE OWNERS AND ATTACHERS

The Commission has long acknowledged that "[p]ole attachments are a key input for broadband deployment projects."[5] As such, one of the primary objectives in this proceeding is to adopt "[r]eforms which reduce pole attachment costs and speed access to utility poles."[6] The NPRM poses a number of questions and makes proposals specifically aimed at shortening the Commission's current pole attachment timeline.[7] The FBA supports the Commission's overall goals, but encourages the Commission to adopt reforms that will improve efficiency by addressing practices of many pole owners and existing attachers that delay and increase the cost of pole access, beyond condensing the timelines for each phase of the process. In particular, the Commission should (1) adopt a "one-touch, make-ready" ("OTMR") regime for pole

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4 NPRM, ¶ 2.

5 *Id*., ¶ 3. *See also* Federal Communications Commission, Connecting America: The National Broadband Plan, at xii (2010) ("Infrastructure such as poles, conduits, rooftops and rights-of-way play an important role in the economics of broadband networks. Ensuring service providers can access these resources efficiently and at fair prices can drive upgrades and facilitate competitive entry."); *Implementation of Section 224 of the Act*, *A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 (2011) ("2011 Pole Attachment Order") ("the Commission has recognized that lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services.").

6 NPRM, ¶ 3.

7 *Id*., ¶¶ 6-31.

attachments[8] and (2) encourage attachers and pole owners to develop both a standard pole attachment application form and a process to allow for electronic submission of applications. The FBA submits that these reforms will best "balance[] the legitimate needs and interests of new attachers, existing attachers, utilities, and the public" as the Commission seeks to "accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment."[9]

A. A One-Touch, Make-Ready Regime Is an Effective and Equitable Way to Reduce Pole Attachment Delays and Costs

Many of the issues and questions raised in the NPRM were already the subject of debate leading up to the *2011 Pole Attachment Order*. The rules adopted in that *Order*, which imposed timelines on the pole attachment application process, have helped keep broadband providers, including fiber builders, from getting bogged down in their deployments as survey work is performed, make-ready estimates are developed, and make-ready work is performed. Yet, six years after the *2011 Pole Attachment Order*, the FBA's service provider members still find that substantial problems persist in seeking access to poles. In too many instances, pole owners simply ignore the Commission's mandated timelines. In effect, the pole owner "dares" the entity seeking to attach to bring an enforcement action, knowing that it is costly to pursue a complaint and virtually impossible to have it resolved in a timely fashion. Thus, experience suggests that simply reducing the number of days permitted for a particular phase of the pole attachment

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8 *See id*., ¶ 21; *see also* Fiber to the Home Council, Role of State and Local Governments in Simplifying the Make-Ready Process for Pole Attachments (Nov. 2015) ("OTMR White Paper"). To be clear, FBA understands OTMR to mean policies that allow any communications service provider putting new attachments on a pole to perform all make-ready work that does not result in a customer outage, using contractors from a list approved by the utility pole owner.

9 NPRM, ¶¶ 1, 6.

application process or combining phases may not be sufficient to address ongoing practices of many pole owners and existing attachers that delay and increase the cost of pole access for new attachers.

The Commission has previously acknowledged that "[a]s a general matter, promoting the deployment of competitive broadband infrastructure through one-touch make-ready policies is consonant with the goals of federal telecommunications policy, the Communications Act, and applicable FCC regulations."[10] Nevertheless, the Commission has yet to implement such a policy at the federal level. The FBA submits that this proceeding presents the perfect opportunity to adopt an OTMR approach that would "spur positive decisions on broadband infrastructure deployment"[11] and allow for more effective and efficient management of the use of poles.[12] The primary benefit of an OTMR policy is that it minimizes the time required for make-

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10 *See* Letter from Howard J. Symons, General Counsel, Federal Communications Commission, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice (Oct. 31, 2016) (urging the Department of Justice to file a statement of interest in federal court to oppose AT&T's claim that Louisville's OTMR ordinance was preempted by federal law).

11 NPRM, ¶ 21.

12 To be sure, one-touch make-ready may not be appropriate in every situation. Some pole work may be so sensitive that the facility owner can rightly insist on doing the work itself. For instance, one touch make-ready might be restricted to simple make-ready construction ("SMRC") where no customer outage is anticipated. SMRC would include attachment transfers and relocations in the communications space – including straight or curved cable locations – involving installation or use of clamps, down guys, anchors, guy guards, extension arms, verticals, and bonds. Make-ready work requiring customer outages might be considered "complex make-ready construction" ("CMRC"), and would be performed by either the pole owner or the owner of an attachment already on a pole. Likewise, any make-ready work in the power supply space, where dangerous electrical lines run, would be deemed CMRC and would be performed by the electric utility. Indeed, the Pole Attachment Act requires utilities to notify attachers before modifying or altering a pole – work that is likely to cause a customer outage and therefore to be CMRC – in order to provide those attachers with time to modify their attachments. 47 U.S.C. § 224(h). Section 224(h), though, does not apply in the case of SMRC.

ready work. Indeed, pole access delays, and in particular lag times associated with make-ready work, were the impetus behind implementation of OTMR ordinances in cities such as Nashville, Tennessee.[13]

OTMR also tends to reduce administrative costs – for instance, because new attachers already are obligated to pay for any necessary make-ready construction, the use of authorized contractors can eliminate the need for the utility and the existing attachers to each separately invoice the new attacher for the costs of performing make-ready.[14] Those savings in deployment costs frequently are then passed on to the consumer once the provider's broadband service becomes available. As Next Century Cities observed in 2016, "providers are likely to look more

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13 *See* Nashville Ordinance No. BL2016-343, Title 13 of the Metropolitan Code, § 13.18 *et seq*. Google Fiber was first announced in Nashville, Tennessee in January 2015. However, rollout of the service was slow and the company explained in September 2016 that "[a] big contributor to these delays is the 'make ready' process required to attach a new line to a utility pole. … Of the 88,000 poles [Google] need[s] to attach Google Fiber to throughout Nashville, over 44,000 will require make ready work. But so far, only 33 poles have been made ready." Google Fiber Blog, "To Nashville, with love" (Sept. 1, 2016) *available at* https://fiber.googleblog.com/2016/09/to-nashville-with-love.html; *see also* Letter from Jeremy Elrod, Chair – Public Works Committee, Councilmember, District 26, and Anthony Davis, Councilmember, District 7, Nashville Metropolitan Council, to Fellow Council Members (Aug. 30, 2016) *available at* http://media.bizj.us/view/img/10137195/20160830193346068.pdf (noting that although the OTMR ordinance would not resolve all issues related to pole attachments, "[i]t will have a direct impact on whether or not Nashville's residents and businesses can enjoy competitive, affordable 21st century broadband infrastructure in an efficient manner that maximizes public safety.").

14 Utilities have also indicated their discomfort with bearing the responsibility of coordinating make-ready in the communications space. For instance, in 2010, a group of investor-owned utilities urged the Commission to make communications attachers responsible for coordinating make-ready in the communications space, rather than burdening utilities with "new responsibilities in the make-ready process that exceed the scope of rates, terms, and conditions subject to Commission review." *See* Comments of the Alliance for Fair Pole Attachment Rules, WC Docket No. 07-245, at 28 (Aug. 16, 2010). AFPAR comprised American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Progress Energy, and Southern Company.

favorably on OTMR communities as they plan their investments, benefiting both companies and consumers."[15]

Moreover, OTMR is efficient because a single construction crew – a crew with enough skill and experience to be approved by the pole owner itself – is all that is needed to complete pole make-ready to deploy new broadband facilities. OTMR can benefit pole owners because a more efficient construction process helps reduce the number of events that could adversely affect the integrity of their poles by minimizing the number of times construction crews work on individual poles. OTMR also is equitable, because all communications attachers have the same right to use a one-touch process and are equally subject to another attacher's use of a one-touch process.

Finally, similar to the "Dig Once" policies adopted by the federal government and in many municipalities across the country,[16] OTMR reduces total impacts on the community and property owners from pole attachment activity by reducing the number of crew roll-outs. During

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15 Next Century Cities Blog, "'One Touch' Make-Ready Policies: The 'Dig Once' of Pole Attachments" (Jan. 6, 2016) *available at* http://nextcenturycities.org/2016/01/06/one-touch-make-ready-policies-the-dig-once-of-pole-attachments/.

16 A 2012 Executive Order established a dig once policy for Department of Transportation projects, calling it "an approach that can reduce network deployment costs along Federal roadways by up to 90 percent." Press Release, The White House – Office of the Press Secretary, *We Can't Wait: President Obama Signs Executive Order to Make Broadband Construction Faster and Cheaper* (June 13, 2012) *available at* https://obamawhitehouse.archives.gov/the-press-office/2012/06/13/we-can-t-wait-president-obama-signs-executive-order-make-broadband-const. In 2015, the Broadband Opportunity Council called for expansion of this federal policy to projects supported by numerous other federal agencies, including the EPA, USDA, and HUD. Broadband Opportunity Council, *Report and Recommendations Pursuant to the Presidential Memorandum on Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training*, at 16 (Aug. 20, 2015) *available at* https://www.ntia.doc.gov/files/ntia/publications/broadband_opportunity_council_report_final.pdf.

make-ready, construction crews may need to detour or block traffic. Each new crew visit to a pole also presents an additional risk to property, such as structures and landscaping in the public rights-of-way and on adjacent private property. The presence of live electric wires also involves risk for work crews and the public. Sending multiple construction crews out to a pole to complete the make-ready needed to accommodate a new attacher is also inefficient and expensive for the service providers and their customers, as well as for local governments. Indeed, multi-party construction projects make for logistical headaches for municipal governments, which usually require permits or authorization to impede the public rights-of-way. OTMR minimizes these community impacts by reducing the number of times work crews must enter a neighborhood, street, or yard, and tie up traffic or detour pedestrians, and limiting the need for oversight of repetitive construction projects.[17]

B. A Standard Form and Electronic Submission for Pole Attachment Applications Would Foster Investment by Increasing Efficiency in the Process

In addition to an OTMR policy, the FBA submits that other simple process reforms would improve the efficiency of the pole attachment process. In particular, the Commission should encourage attachers and pole owners, perhaps in conjunction with Commission staff, to develop both a standard pole attachment application form and a process to allow for electronic submission of applications. By maintaining a standard form, all parties would know in advance

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[17] In adopting its OTMR ordinance, the Louisville Metro Council considered that the ordinance would "reduc[e] inefficiencies and congestions on [Louisville] streets." *See An Ordinance Amending Chapter 116 Of The Louisville Metro Code Of Ordinances Regarding Communication Services Franchises (Amendment By Substitution) Before the Public Works, Bridges & Transportation Committee* at 18:12 (Louisville Metro Gov't Feb. 2, 2016) (testimony of Councilman Bill Hollander) *available at* http://louisville.granicus.com/MediaPlayer.php?view_id=2&clip_id=4421&meta_id=523828 (noting that the Ordinance would "reduce disruption and inconveniences on [Louisville] streets").

what information is required to process the application, and could more easily replicate the process for large-scale network buildouts. This common understanding will simplify the application process by reducing the likelihood that pole owners could either intentionally or inadvertently run afoul of the Commission's timelines for approval of pole attachment applications by continuously asking the applicant to supplement its application. A standard application form also would facilitate the Commission's adjudication of a dispute between pole owners and prospective attachers, in the event that one arises.

Not only should forms be standardized, but the application process should be made more efficient through an electronic portal for submitting applications. Electronic submission of applications would facilitate prospective pole attachers' ability to easily and efficiently submit complete applications, helping pole owners comply more readily with strict deadlines for processing applications. The efficiencies gained from these process reforms, in turn, would stimulate competition and expedite broadband providers' ability to build out network infrastructure and bring competitively priced broadband service, including through all-fiber networks, to more communities.

II. THE FBA SUPPORTS THE COMMISSION'S PROPOSAL TO ELIMINATE THE REQUIREMENT THAT ILECS NOTIFY RETAIL CUSTOMERS OF PLANNED COPPER RETIREMENTS

The NPRM seeks comment on whether to modify Section 51.332 of the Commission's rules by "eliminating the requirement that incumbent LECs provide direct notice of planned copper retirements to retail customers, both residential and non-residential."[18] The FBA supports this proposal for several reasons.

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[18] NPRM, ¶ 64. The relevant sections of the rule for this purpose are Sections 51.332(b)(3), (c)(2), (d)(6)-(8), and (e)(3)-(4). The NPRM alternatively suggests repealing Section 51.332 in its entirety and "returning to a more streamlined version of the pre-2015

First, fiber-based broadband services are far superior to copper-based services.[19] All-fiber networks provide virtually unlimited, symmetrical bandwidth to consumers, and are readily scalable to higher speeds simply by upgrading modulating electronics. Demand for higher-performance broadband services by consumers, businesses, and institutions is skyrocketing, and there is every indication this trend will continue. In response, broadband service providers have made clear their intent to deploy all-fiber networks across the country.[20] States and local communities also have recognized the importance of all-fiber connectivity to power innovation and economic development.[21] Importantly, industry experience demonstrates that the vast majority of consumers welcome the transition from copper to fiber-based services.[22] However,

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Technology Transitions Order requirements for handling copper retirements subject to Section 251(c)(5) of the Act." *Id*., ¶ 58. FBA submits that if the rule is repealed rather than modified, the Commission should make clear that states cannot subsequently impose their own retail customer notice obligation for planned copper retirements.

19 *See* FCC Office of Engineering and Technology and Consumer and Governmental Affairs Bureau, *2015 Measuring Broadband America, Fixed Broadband Report: A Report on Consumer Fixed Broadband Performance in the U.S.* (Dec. 2015) *available at* https://www.fcc.gov/reports-research/reports/measuring-broadbandamerica/measuring-broadband-america-2015.

20 *See* Sean Buckley, "U.S. FTTH deployment rose 13 percent in 2015, says FTTH Council," FierceTelecom (Nov. 16, 2015) *available at* http://www.fiercetelecom.com/telecom/u-s-ftth-deployment-rose-13-percent-2015-says-ftth-council (citing FTTH Council/RVA, LLC research regarding the availability of FTTH services in the United States). In 2016, the growth rate for homes marketed with FTTH services rose even faster, at approximately 16 percent. *See* Michael Render, RVA LLC, "North American FTTH: The Latest Research" (presentation at 2016 Fiber Connect, Nov. 27, 2016).

21 *See* Jamie McGee, "Chattanooga Mayor: Gigabit speed internet helped revive city," The Tennessean (June 14, 2016) *available at* http://www.tennessean.com/story/money/2016/06/14/chattanooga-mayor-gigabit-speed-internethelped-revive-city/85843196/.

22 *See, e.g.*, Comments of the Fiber to the Home Council Americas on the Technology Transitions NPRM, GN Docket No. 13-5 et al., 23-24 (Feb. 5, 2015) ("FTTH Technology Transitions Comments"); Comments of CenturyLink, GN Docket No. 13-5 et al., 28-29 (Feb. 5, 2015) ("CenturyLink Technology Transitions Comments") (CenturyLink

the requirements for notifying retail customers of planned copper retirement set forth in Section 51.332 "drag[] out the copper retirement process," rather than promote fiber deployment,[23] and should be repealed.

Second, there is no credible, systematic evidence that replacing copper with fiber produces any harm to consumers. Indeed, the New York Public Service Commission was clear in the Commission's Technology Transitions proceeding that it did not favor the imposition of additional comment requirements by all-fiber providers since fiber deployment represents a major upgrade of service.[24] Thus, a Commission-mandated retail customer notice requirement is unnecessary.

Finally, repealing the retail customer notice requirements will reduce unnecessary copper retirement costs for providers, thereby facilitating the proliferation of all-fiber networks. Indeed, as Chairman Pai observed when the Commission voted to adopt the NPRM, "[w]ithout rules that keep costs low and encourage deployment, [innovative providers] won't get off the ground—and consumers will never benefit from the competition they're trying to bring to the broadband marketplace."[25] The FBA therefore supports the Commission's proposal to repeal the retail

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received "virtually universal positive feedback from retail customers, who are typically elated by the prospect of faster broadband speeds and a meaningful alternative to cable competitors."); Comments of Verizon, GN Docket No. 13-5 et al., 16 (Feb. 5, 2015) ("Verizon Technology Transitions Comments") (Verizon stated that, "throughout [its] latest copper retirement or network modification processes, it has not received a single such documented objection" from consumers.).

23 *See Technology Transitions et al.*, GN Docket No. 13-5 et al., Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking, FCC 15-97, Dissenting Statement of Commissioner Ajit Pai, 2 (2015).

24 *See* Initial Comments of the New York Public Service Commission, GN Docket No. 13-5 et al., 8-9 (Feb. 5, 2015).

25 NPRM, Statement of Chairman Ajit Pai.

customer notice elements of Section 51.332. This approach will "better enable broadband providers to build, maintain, and upgrade their networks, which will lead to more affordable and available Internet access and other broadband services for consumers and businesses alike."[26]

III. THE COMMISSION SHOULD ADOPT CRITERIA THAT CAN BE USED TO READILY DETERMINE WHICH STATE AND LOCAL LAWS AND REGULATIONS ADVERSELY AFFECT INFRASTRUCTURE DEPLOYMENT AND PROHIBIT TELECOMMUNICATIONS SERVICES IN VIOLATION OF SECTION 253 OF THE COMMUNICATIONS ACT

The NOI seeks comment on whether the Commission should enact rules "to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment" in violation of Section 253 of the Communications Act.[27] The FBA supports this proposal, and herein highlights some specific issues which should guide the Commission in developing such criteria.

Congress adopted Section 253 to remove barriers to entry and as a fundamental element of the market-opening provisions of the Telecommunications Act of 1996. The core directive in the provision is that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[28] Congress acknowledged, however, the legitimate role of the States in overseeing certain activities related to the deployment of telecommunications infrastructure and services, and as such included additional provisions in the statute to preserve that role subject to the overarching objective of the section of removing

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26 NPRM, ¶ 2.

27 NOI, ¶ 100.

28 47 U.S.C. § 253(a).

barriers to entry.[29] The Commission has long understood the objective and value of Section 253, explaining that, rather than regulatory fiat, "Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals."[30] More recently, Chairman Pai, as part of his Digital Empowerment Agenda introduced last fall while he was still a Commissioner, offered renewed support for using Section 253 to remove barriers to network deployment:

> [W]here states or localities are imposing fees that are not 'fair and reasonable' for access to local rights of way, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined.[31]

Members of the FBA, including service providers, equipment vendors, and fiber construction contractors, all believe — and have demonstrated — that access to public rights-of-way ("PROW") on reasonable, non-discriminatory terms is critical to the deployment of 5G and

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29 *See id*. § 253(b), (c).

30 *Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13096 (1996).

31 *See* Remarks of FCC Commissioner Ajit Pai at the Brandery, "A Digital Empowerment Agenda" (Sept. 13, 2016) ("Pai Digital Empowerment Remarks"). *See also* FCC Commissioner Michael O'Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, "Oversight of the Federal Communications Commission," at 1-2 (Sept. 15, 2016) ("At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.").

other advanced telecommunications services.[32] Unfortunately, too often, state and local governments, seeking to leverage their control over PROW and other government controlled infrastructure, have imposed significant roadblocks to broadband and telecommunications network deployments.

Therefore, the Commission should, in its role as the prime interpreter of the Act, provide guidance as to what practices by state and local authorities "prohibit or have the effect of prohibiting" the provision of telecommunications services in violation of Section 253(a). It also should clarify the scope of state and local authority to manage PROW, as articulated in Section 253(c), and that state and local actions under each of the elements of Section 253(c) are tightly circumscribed. Finally, the FBA urges the Commission to make clear that entities that seek to access PROW may bring an action under Section 253(c) when state and local regulators' management activities or compensation requirements exceed the scope of Section 253(c). Such clarifications would address a number of the specific issues raised in the NOI including deployment moratoria, rights-of-way negotiation and approval process delays, excessive fees and costs, imposition of unreasonable conditions on PROW access, bad faith negotiations, and lack of transparency in the state and local application process. More importantly, by setting forth

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[32] The Commission acknowledged in a Public Notice seeking comment on a petition for declaratory ruling filed by Mobilitie, LLC that "next generation services [such as 5G] have the potential to revolutionize the mobile wireless experience." *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, DA 16-1427 (rel. Dec. 22, 2016) ("Mobilitie Public Notice"). In its petition, Mobilitie correctly observed that "[r]eaping the promise of wireless broadband and now 5G requires massive investments in cell sites, backhaul, and transport facilities, as well as access to rights of way for building that infrastructure." Petition for Declaratory Ruling, Mobilitie, LLC, WT Docket No. 16-421 (filed Nov. 15, 2016) ("Mobilitie Petition").

clear "rules of the road," the Commission will facilitate smooth rollouts of telecommunications infrastructure and services across the nation going forward.[33]

A. The Provisions in Section 253 Are Ambiguous and Have Been Interpreted Inconsistently

The general mandate under Section 253(a) is that state and local regulations cannot "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[34] At the same time, Congress acknowledged a legitimate oversight role for state and local authorities by permitting States and local governments to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[35]

Portions of Sections 253(a) and 253(c) are ambiguous. For instance, what does it mean for a regulation to "have the effect of prohibiting the ability of any entity" to provide service? What activities and regulations are within the scope of managing PROW? What is "fair and reasonable compensation"? When is compensation "competitively neutral and nondiscriminatory" if incumbents operate under decades-old franchises while new entrants pay compensation under a different methodology? What does it mean for compensation

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33 Indeed, the Commission has long acknowledged the need for "guidelines for public rights-of-way policies that will ensure that best practices from state and local government are applied nationally." *See* Federal Communications Commission, Connecting America: The National Broadband Plan, at ch. 6 (2010).

34 47 U.S.C. § 253(a).

35 *Id*. § 253(c). Section 253 also allows States and local governments to "impose, on a competitively neutral basis … requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." *Id*. § 253(b).

requirements to be "publicly disclosed" by the state or local government? Absent Commission guidance on these issues and in light of inconsistent case law across the nation, some state and local governments have adopted regulations that result in significant roadblocks to broadband and telecommunications services deployment. Because access to PROW is critical to the deployment of telecommunications infrastructure, including that which will support 5G and other advanced telecommunications services, the time is ripe for the Commission to provide guidance as to the proper interpretation of these provisions, consistent with the underlying objective of Section 253, and the pro-competition goals of the Telecommunications Act of 1996.

B. The Commission Should Interpret the Phrase "Prohibit or Have the Effect of Prohibiting" in Section 253(a) Consistent with the Purposes of the Statute

The general mandate under Section 253(a) is that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[36] The Commission has previously stated that practices that clearly "prohibit" the provision of telecommunications services, such as regulations that on their face "prohibit all but one entity from providing telecommunications services in a particular State or locality" are not permissible under Section 253(a).[37] However, the Commission has not otherwise commented on the boundaries of this term.

Meanwhile, over the past two decades, in the absence of the Commission's full interpretation of the statute, there have been inconsistent interpretations of the statute across the

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36 *Id*. § 253(a).

37 *Classic Telephone, Inc.*, 11 FCC Rcd at 13095.

federal court system.[38] The Eighth and Ninth Circuits, for instance, have required a Section 253(a) claim to demonstrate in effect that there has been an outright prohibition of the provision of service.[39] For example, in *Sprint Telephony*, the Ninth Circuit held that an ordinance that, among other things, established numerous zoning restrictions, required an onerous application process for access to PROW (including hearings), and allowed the decision-maker discretionary authority to deny or conditionally grant an application, did not violate Section 253(a).[40] By contrast, other circuits have concluded that Section 253(a) does not require a regulation to effect an outright prohibition to contravene the statute's proscription against effective prohibition.[41] For instance, the Tenth Circuit in one case found that the combined effect of a local ordinance

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38 *See* Mobilitie Public Notice at 10-11.

39 *See Sprint Telephony PCS, LP v. San Diego County*, 543 F.3d 571, 579-81 (9th Cir. 2008) (*en banc*) (*overruling City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001)) (holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."). *See also Level 3 Commc'ns, L.L.C. v. City of St. Louis, Missouri*, 477 F.3d 528, 533 (8th Cir. 2007) (A plaintiff suing a city under Section 253(a) of the Act, which bars state or local requirements that "may prohibit or have the effect of prohibiting" the provision of telecommunications service, must show actual or effective prohibition, rather than the mere possibility of prohibition. This need not be a complete or insurmountable prohibition, but "an existing material interference with the ability to compete in a fair and balanced market.").

40 *See Sprint Telephony*, 543 F.3d at 578.

41 *See Puerto Rico Tele. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (A prohibition does not need to be complete or insurmountable to run afoul of Section 253(a), and a regulation need not erect an absolute barrier to entry in order to be found prohibitive). *See also BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1186-87 (11th Cir. 2001) (Section 253(a) of the Communications Act, which prohibits state and local governments from passing laws that may prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service, imposes substantive limitations on state and local government regulation of telecommunications).

which required a detailed application, registration fee, and installation of excess capacity on underground conduit for the city's use violated Section 253(a).[42]

Although inquiries into state and local ordinances must necessarily be fact-specific, the application of disparate preemption standards by different courts can substantially frustrate a provider's attempts to build a out new infrastructure to support telecommunications services that may span multiple jurisdictions. Further, differing interpretations by circuit courts in different areas of the country could undermine national broadband deployment goals and the construction of robust infrastructure and networks. Thus, the Commission should more clearly delineate the types of activities that would violation Section 253(a).

While a hard and fast interpretation that anticipates all scenarios with specificity is not possible, or even desirable, as flexibility to address novel situations is prudent, the Commission can and should set forth clear guidelines articulating how to assess whether a particular type of state or local government action prohibits or has the effect of prohibiting the provision of an interstate or intrastate telecommunications service so as to constitute a violation of Section 253(a). Those guidelines should, at a minimum, make clear that Section 253(a) would proscribe not only facial prohibitions to provide service, but any regulation or requirement that (1) would impose conditions, obligations, or restrictions on a provider, either prior to the initiation of service, as part of its ongoing obligations, or as part of a planned expansion of service, that would "substantial[ly] increase" the provider's costs such that the business case no longer

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42 *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) (finding that "substantial increase in costs imposed by the excess conduit requirements and the appraisal-based rent that in themselves renders those provisions prohibitive, not the additional cost-based application and registration fees").

supports the provision or expansion of any telecommunications service [43] or (2) allows the authority substantial discretion in the processes approving whether the company may engage in activities necessary to commencing or continuing to provide service within the community.[44]

Regarding what elements constitute a Section 253(a) claim, the FBA submits that the interpretation adopted by the First, Tenth, and Eleventh Circuits better serves the objectives of the statute and should inform the Commission's guidance. Namely, allowing states to enact and enforce excessive regulations related to access to PROW, even those that do not impose an outright prohibition of service, would undermine Congress's express intent to allow "competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers." Rather, the Commission should adopt rules to clarify that, when challenging a particular practice or regulation under Section 253(a), a carrier should only be required to provide evidence that the government's denial differs from standard commercial practices for access to private rights-of-way, either in terms of a material increase in costs or more than a trivial increase in timing. If the carrier makes that initial showing, the burden should shift to the government to demonstrate that the carrier, if subject to and complying with the statute, regulation, or requirement, could nonetheless offer service on a technically and economically viable basis.

The FBA submits clarifying the proper interpretation of Section 253(a) in this way would ensure that the intended purpose of Section 253 – namely, removing barriers to entry for

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43 *See Level 3 Commc'ns*, 477 F.3d at 533.

44 *See Bell Atlantic-Maryland, Inc. v. Prince George's Cnty., Maryland*, 49 F. Supp. 2d 805 (D. Md. 1999) (vacated on other grounds, *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 212 F.3d 863 (4th Cir. 2000)) (finding that a county's "decision to grant or deny a franchise may not be left to the county's ultimate discretion").

telecommunications service – would be best served. As parties begin to plan for massive infrastructure deployments to support 5G and other advanced services, a consistent, nationwide interpretation is needed to provide certainty. The interpretation urged above would provide clarity to providers, state and local authorities, and courts as to what is and is not permissible and the elements of a claim in a Section 253(a) dispute, thereby eliminating certain barriers that might be erected and promoting more rapid deployment.

C. The Commission Should Clarify the Proper Interpretation of the Elements of Section 253(c)

Section 253(c) includes four elements that merit the Commission's interpretation so as to promote the purpose of Section 253. The statute recognizes that while state and local authorities are permitted "to manage the public rights-of-way," how and what they can manage is subject to certain important limits under Section 253(c). First, any compensation required from telecommunications providers for PROW access must be "fair and reasonable." Second, that compensation must be assessed "on a competitively neutral and nondiscriminatory basis." Third, regulation of the access to and use of PROW must be "on a nondiscriminatory basis." And, finally, any compensation required for access to PROW must be "publicly disclosed by [the state or local] government."[45]

Unfortunately, without Commission guidance, some state and local governments have run afoul of rational interpretations of Section 253(c) and adopted regulations that result in significant roadblocks to broadband and telecommunications services deployment, contrary to the intended purpose of Section 253. The Commission should issue rules on the proper interpretation of each of these elements so that states, local authorities, and providers all have a

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45 47 U.S.C. § 253(c).

clear understanding of the primary bounds of permissible actions and regulations in managing PROW.

1. Management Activities Should Be Limited to Governing the Physical Alteration, Occupation, and Restoration of PROW in Order to Be Deemed "Reasonable"

The Commission should clarify that a state or local government's right-of-way management activities must be limited to governing the physical alteration, occupation, and restoration of PROW in order to fall within the scope of Section 253(c). Such a declaration would be consistent with the Commission's previous interpretations of permissible management[46] as well as limitations on management functions as interpreted by many courts.[47]

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46 *See Classic Telephone, Inc.*, 11 FCC Rcd at 13103-04 (1996), quoting 141 Cong. Rec. S8172 (June 12, 1995) (statement of Sen. Feinstein) ("During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: 'regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts'; 'require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies'; 'require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation'; 'enforce local zoning regulations'; and 'require a company to indemnify the City against any claims of injury arising from the company's excavation.'"); *See also TCI Cablevision of Oakland Cnty., Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21442 (¶ 103) (1997). (finding that permissible activities under section 253(c) "include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.").

47 *See Bell Atlantic-Maryland, Inc. v. Prince George's Cnty., Maryland*, 49 F. Supp. 2d 805 (D. Md. 1999) (vacated on other grounds, *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 212 F.3d 863 (4th Cir. 2000)) (finding that under Section 253(c), the terms of any county-issued franchise must be limited to the narrow scope of activities relating to the physical alteration, occupation, and restoration of PROW. In addition, a county's "decision to grant or deny a franchise may not be left to the county's ultimate discretion, but rather may only be conditioned on the telecommunication company's agreement to comply with the County's reasonable regulations for managing the use of its rights-of-way."); *see also City of Auburn v. Qwest Corp.*, 260 F.3d 1160,

To ensure maximum effectiveness of this clarification, the Commission should, in the event of a dispute, continue to uphold its policy of requiring a state or local authority to state with specificity how its requirements relate to the management of access to and use of its PROW.[48]

The FCC should, to complement its interpretation of "reasonable" management practices, consider adopting a "shot clock" setting an outer time limit for state and local authorities to review and issue decisions on applications for access to PROW[49] similar to the shot clock adopted for Section 621 local franchise applications in 2007[50] or for Section 332 siting applications in 2009.[51] In establishing these earlier time limitations, both upheld by the courts,

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1178 (9th Cir. 2001) (vacated on other grounds, *Sprint Telephony*, 543 F.3d 571) (finding that city ordinances that attempted to "regulate the telecommunications companies themselves, not merely the rights-of-way" violated section 253(c)).

48 *See Classic Telephone, Inc.*, 11 FCC Rcd at 13104 (1996) ("[C]onclusory statements are inadequate to establish that [a state or local authority's] actions reflect an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way.").

49 Alternatively, the Commission could adopt a shot clock on the basis that a lack of a timetable for reviewing PROW access applications promotes delays that have the effect of prohibiting the provision of telecommunications services in violation of Section 253(a). *See TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) ("the extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays").

50 *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶¶ 70, 72 (2006) (finding that "90 days provides [local franchise authorities (LFAs)] ample time to review and negotiate a franchise agreement with applicants that have access to rights-of-way" and "[f]or other applicants, … six months affords a reasonable amount of time to negotiate with an entity that is not already authorized to occupy the right-of-way, as an LFA will need to evaluate the entity's legal, financial, and technical capabilities in addition to generally considering the applicant's fitness to be a communications provider over the rights-of-way") ("2007 Local Franchising Order").

51 *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT

the Commission found that state or local application review processes were resulting in "unreasonable delays" in the deployment of cable and wireless services, respectively,[52] thereby undermining the competitive objectives of Section 621 and Section 332.[53] The Commission therefore determined that a declaratory ruling was needed to "provide guidance, remove uncertainty and encourage the expeditious deployment of wireless broadband services."[54] The FBA submits that similar circumstances exist for PROW access requests reviewed by state and local authorities under Section 253, and as such it would be appropriate for the Commission to adopt a shot clock provision for such applications. The Commission could determine, for example, that if a state or local authority fails to act on an application for access to PROW within 90 days where the municipality previously has granted access to PROW to the applicant, or 6 months for initial applicants (who do not have a franchise), then an application will be deemed granted. This will ensure that state or local regulatory inaction stemming from a requirement to obtain approval for PROW access does not act to prohibit the provision of telecommunications service and undermine competition by hampering new entry or expansion of service areas. Delays in access can lead to lost customers, which is not competitively neutral. Consistent with

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Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994, ¶ 32 (2009) (finding "that a 'reasonable period of time' is, presumptively, 90 days to process personal wireless service facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications.") ("2009 Declaratory Ruling").

52 *2007 Local Franchise Order*, ¶ 22; *2009 Declaratory Ruling*, ¶ 32.

53 *See 2007 Local Franchise Order*, ¶ 68 (concluding that "without a defined time limit, the extended delays will continue, depriving consumers of cable competition"; *2009 Declaratory Ruling*, ¶ 35 (finding that "[s]tate and local practices that unreasonably delay the siting of personal wireless service facilities … impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996").

54 *Id.*, ¶ 32.

the Commission's 2014 declaratory ruling regarding review of wireless siting applications, the shot clock should start running from the date the application is first submitted,[55] not when the reviewing authority declares the application complete.[56] Additionally, the reviewing authority should not be able to avoid a section 253 shot-clock by enacting a moratorium on reviewing PROW access applications.[57]

2. The Commission Should Interpret "Fair and Reasonable Compensation" to Allow Fees or Other Compensation Only If They Are Directly Related to the Actual Costs of Supervisory Functions in Managing a Provider's Use of PROW and the Cost of Maintaining the Portion of PROW Used by the Provider

The Commission should make clear that "fair and reasonable compensation" requires that the fees imposed on providers by a state or local government must be directly related to the actual costs of supervisory functions in managing a provider's use of PROW and the actual costs of performing those functions and maintaining the portion of PROW used by the provider. This interpretation would send a clear message to state and local authorities that attempts to use the compensation clause of Section 253(c) to either slow the deployment of telecommunications services or as a means of generating revenues for the general municipal coffers or extracting additional unrelated in-kind benefits, such as gifts of free fiber or service along certain routes, will be subject to preemption by the Commission and should not be tolerated by the courts.

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55 As noted in Section I.B., *supra*, development of a standard application form for PROW access such as pole attachment would improve efficiency in the process for all parties involved.

56 *See Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al.*, WT Docket No. 13-238 et al., Report and Order, 29 FCC Rcd 12865, ¶ 258 (2014).

57 *See id*. Such moratoria on their face violate Section 253(a) under any interpretation of that subsection.

The FBA's requested clarification is consistent with long-standing Commission policy regarding Section 253(c). For instance, more than two decades ago, in discussing the compensation provisions of Section 253(c), the Commission explained that state and local authorities were permitted to recover from telecommunications carriers utilizing PROW, those "increased street repair and paving costs that result from repeated excavation."[58] This reasonable interpretation relied on the legislative history of Section 253(c) and furthers the intended purpose of this provision without frustrating the oversight role reserved to state and local authorities. However, absent further guidance from the Commission, numerous state and local authorities have imposed compensation schemes that stretch the boundaries of, and often go beyond, the limitations set forth in Section 253(c).

The FBA submits that, consistent with its requested clarification, state and local authorities should be permitted to assess fees only if they are demonstrably cost-based. The appropriate costs to factor into fee calculation include administration costs (i.e. intake, processing and review of applications) and costs to maintain PROW (perhaps assessed based on the amount of space on, above, or under a PROW occupied by a particular provider relative to costs of maintaining PROW as a whole for all users, including vehicles, pedestrians, etc...). To help determine whether state and local authorities are assessing fees that comport with these parameters, the Commission should consider adopting a rebuttable presumption regarding the reasonableness of rates – perhaps by initiating a statistical study of rates around the country and examining the methods by which the rates were adopted to establish the basis for such a presumption.

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58 *See Classic Telephone, Inc.*, 11 FCC Rcd at 13103.

3. The Commission Should Declare That Fees and Management Activities Are "Competitively Neutral and Nondiscriminatory" Only If, Both on Their Face and in Practice, They Do Not Materially Differ from Fees and Obligations Imposed on Any Other Provider for Similar Access to or Impact on PROW

In response to the NOI's request for comment on potentially "prohibiting excessive fees and other costs that may have the effect of prohibiting the provision of telecommunications service,"[59] the FBA reiterates its support for the request in the Mobilitie Petition for the Commission to declare "that 'competitively neutral and nondiscriminatory' means charges imposed on a provider for access to rights of way that do not exceed the charges that were imposed on other providers for similar access to rights of way."[60] The FBA further agrees that although "fees may legitimately vary where they cover dissimilar deployments, or where one deployment imposes materially greater burdens on the right of way than another," "a locality should … be obligated to explain and justify any variation in its charges by showing why different facilities impose different costs on its management of rights of way."[61] The FBA submits that appropriate factors to consider when evaluating if fees and obligations are competitively neutral and nondiscriminatory include: (1) assessing whether fees and obligations differ among applicants in terms of the "value" of the fees and obligations;[62] and (2) determining

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59 NOI, ¶ 104.

60 Mobilitie Petition at 32.

61 *Id*.

62 *See Cablevision, Inc. v Public Improvement Comm'n*, 184 F.3d 88 (1st Cir. 1999) (finding that the term "competitively neutral" imposes, at most, negative restriction on local authorities' choices regarding management of their rights of way; hence, the statute does not require local authorities to purposefully seek out opportunities to level telecommunications playing field, but if local authority decides to regulate for its own reasons, Section 253 requires that it do so in way that avoids creating unnecessary competitive inequities among telecommunications providers.).

whether different types of providers are subject to disparate treatment by the state or local authority.[63] If a state or local regulation fails to satisfy these factors, it should presumptively be subject to preemption by the Commission, unless the state or local authority can provide a reasonable explanation for the differences in fees.

4. The Commission Should Declare That a State or Local Regulation Satisfies Section 253(c) Only If the Regulation Is "Publicly Disclosed" Prior to Any Attempt by the State or Local Authority to Enforce It

Section 253(c) preserves state and local government authority to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, *if the compensation required is publicly disclosed by such government*."[64] The plain and ordinary meaning of this provision is that a state or local authority must establish and disclose the compensation it seeks to recover from a telecommunications carrier in advance. Such compensation should be publicly viewable in order for this clause to serve its purpose – transparency. If disclosure after the fact were permitted, this statutory requirement would be reduced to a purely ministerial act, and the "public disclosure" clause of Section 253(c) would be rendered effectively meaningless, in contravention of well-established statutory construction principles. Moreover, an advance public disclosure requirement is

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63 *See, e.g.*, *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21443 (¶ 108) (1997) (the Commission made clear that local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are likely to be neither competitively neutral nor nondiscriminatory.); *see also TCG N.Y., Inc. v City of White Plains*, 305 F.3d 67 (2d Cir. 2002), cert. denied, 123 S.Ct. 1582 (2003) (finding that White Plains' five percent gross revenue fee provisions imposed on TCG and other non-incumbent carriers, but not on Verizon, were preempted due to the differential treatment carriers received under these provisions).

64 47 U.S.C. § 253(c) (emphasis added).

consistent with Commission precedent, which makes clear that public disclosure of compensation and other requirements imposed by a state or local regulation is a prerequisite to those regulators invoking Section 253(c) as a defense.[65] Further, public disclosure of what each PROW user is paying will allow providers to monitor how their payments compare to other providers and, if there is a concern, will both help avoid needless litigation under Section 253(c) and facilitate well-informed complaints where they are necessary. Therefore, the Commission should declare that a state or local regulation may be protected under Section 253(c) only if the regulation is "publicly disclosed" prior to any attempt by the state or local authority to enforce it.

D. The Commission Should Clarify How Section 253(c) Relates to Section 253(a)

This proceeding also affords the Commission the important opportunity to provide guidance to the industry as well as state and local regulators regarding the relationship between Section 253(a) and Section 253(c). The NOI notes that the Eighth Circuit has concluded that Section 253(c) operates as a "safe harbor functioning as an affirmative defense" to a claim that a state or local regulation or requirement violates Section 253(a),[66] but does not take a position as to whether such an interpretation of the statute is appropriate. FBA submits that the Commission should clarify whether Section 253(c) should in fact be interpreted to operate solely as a "safe harbor" that protects certain state and local statutes, regulations, and requirements where the FCC or a court finds there has been a violation of Section 253(a), or if Section 253(c) provides a

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65 *See Classic Telephone, Inc.*, 11 FCC Rcd at 13103 ("[S]ection 253 permits State and local governments to impose compensation requirements for the use of the public rights-of-way so long as such compensation is fair and reasonable, competitively neutral, nondiscriminatory, ***and*** is publicly disclosed.") (emphasis added).

66 NOI, ¶ 100.

basis for seeking relief from a state or local regulation even if there has been no Section 253(a) violation.

Over the past two decades, courts have reached disparate conclusions on this issue, leading to inconsistent application of the statute across the nation. While some courts have held that Section 253(c) can serve as an independent basis for seeking relief from a state or local regulation,[67] others have interpreted the statute to require a violation of Section 253(a) before addressing the question of whether the regulation is nevertheless permissible under Section 253(c).[68] The Commission's previous statements regarding Sections 253(a) and 253(c) have done little to ameliorate this confusion.[69] Such inconsistency and lack of clarity underscores the

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67 *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) (concluding that it is incorrect to say that reading a private right of action into §253(c) "runs counter to the statutory scheme of §253 itself"); *N.J. Payphone Ass'n v. Town of W. N.Y.*, 299 F.3d 235, 241 (3rd Cir. 2002) ("Although Sections 253(b) and (c) are framed as savings clauses, Section 253(d) speaks of 'violation' of (b) suggesting that it must impose some sort of substantive limitation independent of (a). This also raises the possibility that Section 253(c), which is similarly phrased [to Section 253(b)], contains a parallel limitation.").

68 *See Level 3 Commc'ns*, 477 F.3d 528, 532-33 (concluding that Section 253(c) is an affirmative defense to an established violation of Section 253(a), not a separate cause of action on its own; only after the plaintiff sustains its burden of showing that a city has violated Section 253(a) does the burden of proving that the regulation comes within the safe harbor in Section 253(c) fall on the defendant municipality).

69 *See State of Minnesota (Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way)*, 14 FCC Rcd 21697, 21704 (¶ 11) (1999) ("To determine whether the Agreement violates section 253 of the Act, we must first consider whether the Agreement is subject to section 253. If we find that the Agreement falls within the scope of section 253, we must determine whether the Agreement may prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service. If the Agreement has that effect, the Commission must preempt it unless the Agreement comes within the terms of the exceptions Congress carved out in sections 253(b) and (c)."); *see also TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21443 (¶ 101) (1997) ("Parties seeking preemption of a local legal requirement … must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).").

need for the Commission to interpret the statute.[70] What interpretation is supportable depends in large part of how Section 253(a) is interpreted. (*See* Section III.B., *supra*.) The Commission should also consider what interpretation fulfills the purpose of the statute – namely, reducing barriers to deployment while still maintaining an appropriate role for state and local regulators.[71]

As previously discussed, courts have issued inconsistent statements about the showing required to establish a claim for an alleged violation of Section 253(a).[72] The FBA submits that the purpose of Section 253 would be best served by allowing providers to challenge state regulations as effectively prohibiting the provision of telecommunications service in violation of Section 253(a) under a lower evidentiary threshold, and then affording the state or locality the opportunity to defend such regulations using the protections set forth in Section 253(c).[73] If,

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70 *See Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 99 (1st Cir. 1999) ("One explanation is that Congress intended § 253(c) ... to be a savings clause only. Under this interpretation, § 253(c) could only be used defensively, in the context of a § 253(a) challenge; the statute would simply not apply to local regulations that are not competitively neutral and nondiscriminatory but nonetheless do not constitute prohibitions on entry. Alternatively, the exclusion of § 253(c) from § 253(d) [which provides for FCC preemption] might reflect Congress's selection of a forum for § 253(c) claims, limiting jurisdiction to federal or state courts instead of forcing municipalities with limited resources to defend rights-of-way regulations and fee structures before the FCC in Washington, D.C.... If this interpretation were correct, it would become necessary to decide whether the proper cause of action for a § 253(c) claim is created by § 253(c) itself or arises from some other source.").

71 Indeed, Chairman Pai was clear when he introduced his Digital Empowerment Agenda last fall that "where states or localities are imposing fees that are not 'fair and reasonable' for access to local rights of way, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined." Pai Digital Empowerment Remarks.

72 *See* Section III.A., *supra*.

73 However, the Commission also should declare that if a regulation that is the subject of the claim imposes an outright prohibition on the provision of telecommunications service, it is per se a violation and cannot be saved. Such a regulation would directly contravene

however, the Commission determines that Section 253(a) claims are subject to a higher evidentiary standard, similar to the view taken by the Eighth and Ninth Circuits, then the Commission should interpret Section 253(c) as an independent basis for seeking relief from a state or local regulation, even absent an allegation or finding of a Section 253(a) violation. If in practice, a state can enact a regulation which severely hinders a provider's ability to access PROW, and such regulation is essentially presumed valid because a challenging party must make a showing of "actual or effective prohibition" to establish a Section 253(a) claim, there would be no apparent need for the "savings clauses" set forth in Section 253(c). Moreover, allowing state and local regulators to rely on both a high evidentiary standard to establish a Section 253(a) violation and the corresponding availability of Section 253(c) only as a safe harbor would undermine the purpose of Section 253 by permitting states to erect barriers to entry and then offering them a defense if challenged.

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the purpose of the statute, and therefore Section 253(c) should not be available to a state or local regulator as a defense to such a Section 253(a) violation.

CONCLUSION

For all of the above-stated reasons, the FBA respectfully requests that the Commission take steps in accordance with the recommendations in these comments to facilitate investment in broadband network infrastructure.

Respectfully Submitted,

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